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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 1302

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

150.29 ACRES OF LAND, MORE OR LESS, IN MILWAUKEE COUNTY, WISCONSIN, and VLASTA KRIZ, et al.,
Defendants.

ELINE'S INC.,
Petitioner and Appellant Below

vs.

GAYLORD CONTAINER CORPORATION,
Respondent and Appellee Below.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Inaccuracies in Petition for Certiorari.

In an attempt to dress up this case for the purpose of securing a writ of certiorari, the Petitioner is guilty of a number of serious misstatements.

1. Thus the Petitioner with much repetition throughout its brief, endeavors to make it appear that the trial court admitted testimony of loss of good-will, damage to the lessse's business, or loss of future business profits.

Actually the trial court scrupulously excluded any such evidence and carefully charged the jury on the correct measure of compensation, adding as follows: (R. 529)

> "You are not permitted to make an allowance for damages to personal property of the tenant or the expense of removing the same, nor for any loss of profits, nor for expenditures to secure a new location, or any higher rent which may be there paid, nor are you to consider a lower rent that may have been paid, nor are you permitted to allow for expenditures to prevent a loss of trade, nor for the inconvenience or interruption of business suffered by the necessity of moving. Neither is the loss of goodwill a proper element of damage, nor losses in the business because of the necessity of giving up conveniences that the tenant may have enjoyed on the premises which were condemned. None of these are recoverable."

2. Petitioner states (P. 8-9) that Gaylord received compensation for "ready-to-go value over and above the fair market value of the leasehold." This is *not* the fact. Gaylord's evidence of value was presented by proof of what many concerns in the Paperboard Industry would be willing to pay for the opportunity of taking over Gaylord's leasehold, entirely exclusive of Gaylord's business and organization, but assuming the obligations of the lease (R. 169, 218-219). From this amount the witnesses deducted the value of the machinery and equipment which Gaylord was permitted to remove after condemnation (R. 166-8, 236-7). Their estimates of value expressly excluded from consideration the business organization of Gaylord, its good-will, profits and other assets (R. 163, 167). The evidence introduced and received by the trial court was restricted to proof of *the market value* of Gaylord's leasehold at the date of condemnation.

3. Petitioner is in error in saying (P. 8) that the evidence of cost of improvements and installations was "unaccompanied by any evidence of the value of the use." There was abundant evidence that such costs were incurred by Gaylord, prudently and wisely, and that they enhanced the market value of the leasehold by at least the amount expended, less amortization (R. 80-81, 95, 249-50).

The foregoing instances are only examples of the way in which the facts and issues of this case have been colored and distorted in an effort to persuade this court to grant certiorari. It would unduly expand the size of this brief to point out each misstatement in the Petition.

Chief Reason Urged by Petitioner for Granting Petition.

The chief reason urged by Petitioner for granting the Petition is apparently that the Seventh Circuit Court of Appeals has in some way misapplied this court's decision in *United States vs. General Motors Corp.*, 323 U.S. 373, 65 S. Ct. 357. (P. 9)

The Circuit Court of Appeals made a thorough examination of the evidence and the trial judge's instructions to the jury, and made this observation regarding the connection between this and the *General Motors Case*, (R. 645-6):

> "The Court was trying this case for the second time and devoted much care and patience to the end that the jury might have the correct measure of damages in its deliberations. We think the Court properly instructed the jury and evidenced considerable perspicuity in determining the correct measure of damages in view of the then holding of our Court in the General Motors case and the holding of the

> Supreme Court yet to come. The instant case is not completely parallel with the General Motors case, and not all that is said in that opinion is applicable to the facts here, but in so far as applicable we think the principles there enunciated were properly applied."

The General Motors decision has but little application to this case. There, only the temporary use of leased premises was involved. Here we are concerned with compensation for an entire leasehold. The trial judge recognized the difference when he told the parties at the outset of the trial (See R. 71 in Case No. 1303, Lakeside Laboratories, Inc. vs. Eline's Inc., companion case tried just before this case):

> "The Court: If you think that the General Motors case would justify, for instance, your moving expenses, I am going to rule that it will not. I will tell you that ahead of time. You can make your offer if you want to."

The plaintiff (respondent) accordingly made no attempt to prove damages resulting from moving or similar expenses, but restricted its proof to the time-honored principle of showing the market value of the leasehold that was condemned.

Thus the trial court did not apply the rule of damages established in the General Motors case, and the Circuit Court of Appeals recognized that the two cases were not parallel. How, then, can the Petitioner say that the Circuit Court of Appeals has misconstrued this court's decision in that case? The fact is that the court below was not called upon to construe it, because the trial court did not apply the rules of compensation laid down in the General Motors case. The Petitioner was entirely successful in persuading the trial court that the General

Motors case did not apply. It comes with a bad grace for Petitioner now to claim that the trial court applied the principles of the General Motors case and that it was improper to do so.

Reasons for Granting Writ do not Exist.

The Plaintiff's (Respondent's) evidence of value followed the well established rule in condemnation cases that the condemnee is entitled to recover the fair market value of his property interest, for its highest and best use.

Olson v. U. S., 292 U.S. 246, 255-7.

It was undisputed that the highest and best use of the physical premises (the improved leasehold) was for a manufacturing plant, such as a corrugating paper plant (R. 208-9). The witnesses testified to its value for that purpose, and expressed opinions as to what that value would be in terms of a use of the premises for the balance of the lease (R. 167, 217). From this was deducted the value of the machinery and equipment which the government permitted the tenant to remove (R. 167, 218). The balance was submitted to the jury as the value of the property interest of which the tenant was deprived by the condemnation. Evidence of the amounts expended by the tenant in improving the leasehold premises was introduced, not as additional and separate items of compensation, but as evidence of the extent to which the tenant had enhanced the market value of the leasehold (R. 248-250). All evidence of past and future anticipated profits of Gaylord's business, good-will, and expense of moving, were expressly excluded from the jury (See Court's Instructions R. 531-2). Counsel for Gaylord stated to the jury that no claim was made for such items and the court so charged the jury (R. 515, 529).

Petitioner now attempts to distort this evidence to make it appear that it represents the same thing as compensation for "business" losses, and other consequential elements of damage, held non-compensable by such decisions as *Mitchell vs. U. S.*, 267 U.S. 341. By so doing Petitioner hopes to make it appear that the Seventh Circuit Court of Appeals in this case is extending the the doctrine of the General Motors case to the situation where an entire leasehold is condemned, and not just a portion of it. Thus Petitioner commits two grave errors. It misstates the character of evidence introduced, and it misstates what the Seventh Circuit held in this case.

Petitioner complains that the tenant's experts were permitted to testify that Gaylord's highly improved leasehold would bring a substantial premium on the market as of July 1, 1942. These witnesses pointed out that having the leasehold space, integrated with the machinery and other improvements, would permit a purchaser of the improved leasehold to start at once a profitable operation, which could not be done by a purchaser buying an empty leasehold in one place, the improvements in another, and having to spend a long time combining them (R. 160, 214). It was altogether sensible that plaintiff's witnesses took into account that the improved leasehold would be immediately productive of profit to a purchaser, and that they valued the leasehold on an assembled basis rather than as broken up or disassembled into its component parts. An improved and special type of property must obviously be valued by considering its productivity to a purchaser. That is what it is bought for. Acreage, front foot or square foot values are in such cases no more applicable than they would be in valuing an oilwell.

On this point we cite: *Brooklyn Eastern District Terminal vs. City of New York,* 139 Fed. (2d) 1007, (CCA 2); Cert. Den. 322 U.S. 747.

> "The settled rule is that the owner's loss, not the taker's gain, measures the compensation to be awarded, Boston Chamber of Commerce v. City of Boston, 217 U.S. 189, 195, 30 S. Ct. 459, 54 L.Ed. 725; United States ex rel, T.V.A. v. Powelson, supra, 319 U.S. at page 281, 63 S.Ct. 1047, 87 L.Ed. 1390; but the 'concept of market value' sets the 'practical standard.' United States v. Miller, 317 U.S. 369, 374, 63 S.Ct. 276, 280; Olson v. United States, 292 U.S. 246, 255, 54 S.Ct. 704, 78 L.Ed. 1236. Here we have an interest not bought and sold in the market and sale value must be somewhat hypothetical, though probably not unusually so as condemnation values go. See In re Public Beach, Borough of Queens, supra, 269 N.Y. at page 76, 199 N.E. 5; United States ex rel. T.V.A. v. Powelson, 4 Cir., 138 F. 2d 343, 345; Hale, Value to the Taker in Condemnation Cases, 31 Col. L. Rev. 1, 13. Loss of business profits as such is not allowable, Mitchell v. United States, 267 U.S. 341, 345, 45 S.Ct. 293, 69 L.Ed. 644; but in default of more direct evidence of sale value, present value (i.e., as of the time of taking) of clearly to-be-expected future earnings may be considered. See Sanitary District v. Pittsburgh, Ft. W. & C.R. Co., 216 Ill. 575, 584-586, 75 N.E. 248; James Poultry Co. v. Nebraska City, 136 Neb. 456, 286 N.W. 337; and cf. In re Sixth Ave. Elevated R. R. 265 App. Div. 200, 38 N.Y.S. 2d, 730, 737; 40 Yale L.F. 779, 781."

The Seventh Circuit Court of Appeals was unanimous in sustaining the trial court on this issue of the measure of damages and the admissibility of evidence submitted by the tenant to show the market value of the leasehold. It specifically stated that the trial court had shown "con-

siderable perspicuity in determining the correct measure of damages" (R. 645).

As the opinion of the Seventh Circuit Court of Appeals demonstrates, the principal issues in this case involved the construction to be given to certain provisions of a rather unusual lease (R. 639). The Circuit Court sustained the trial court's construction of these provisions. We fail to see how such a decision is at variance with the decisions of this court, or how such issues present important questions of general interest and concern. Both the District Court and the Circuit Court of Appeals applied well-established rules of contract construction in interpreting these disputed provisions of the lease. Even the dissenting opinion in the Circuit Court of Appeals, which disagreed with the majority opinion only with respect to the construction of two of the provisions in the lease, stated great reluctance in expressing any dissent due to "the reasons very persuasively expressed in the majority opinion". We submit that the majority construction is a sound one and in any event is not at variance with any decision of this court. Likewise, we cannot believe that a construction of the various clauses of this lease in a controversy between two private parties presents any important question of federal law requiring the consideration of this court.

In 1942, Petitioner Eline's, received (by deposit in the Registry of the Court) the sum of $2,290,000 from the United States Government for the group of buildings known as the old Eline Chocolate Plant in Milwaukee and on condition that from this amount the tenants should receive their just compensation (R. 9). Eline's has been dissatisfied with every award for the tenant Gaylord, which has so far been rendered in this

case, including an award by three commissioners and two separate jury verdicts (R. 12, 23, 606). In its determination to make the tenants go "all the way" for their compensation, Eline's misstates the proof and distorts the issues below. The record in this case will substantiate, however, that there is no merit to the charge that the valuation of Gaylord's leasehold in the trial court included anything for Gaylord's business, loss of profits, damage to good-will, expense of moving, or other consequential damages.

The Petition for Writ of Certiorari should be denied.

Dated: June 11, 1945

Respectfully submitted,

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VICTOR M. HARDING, JR.
Attorneys for Gaylord Container Corporation, Respondent.

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1302

ELINE'S INC., PETITIONER

v.

GAYLORD CONTAINER CORPORATION

No. 1303

ELINE'S INC., PETITIONER

v.

LAKESIDE LABORATORIES, INC.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

These two cases arise out of condemnation proceedings instituted by the United States to acquire the fee simple title to certain lands in Milwaukee, Wisconsin. Approximately 91 acres of the land taken was owned by petitioner Eline's,

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Inc., and was improved by industrial buildings. Portions of the property were occupied by Lakeside Laboratories, Inc., and Gaylord Container Corporation under leases from Eline's, Inc. The United States agreed with Eline's as to the amount of compensation to be paid for the entire property and paid the agreed sum, $2,290,000, into court. This payment discharged the obligation of the United States, and the United States has no pecuniary interest in proceedings for distribution of the fund between the various claimants.[1]

Nevertheless, although the United States did not participate in either the trials or the appeals of these proceedings between claimants to the fund, the United States is directly interested in the validity of certain of the propositions of law deemed by the lower courts to be controlling, and presented for the consideration of this Court in the petitions for writs of certiorari. The controversy in each case is between the fee owner of the land and a tenant, as to the proper measure by which to determine the amount to which the tenant was entitled out of the sum paid by the United States for the fee. The court below rejected contentions of the fee owner that this

[1] *United States* v. *Dunnington*, 146 U. S. 338, 351; *Eline's, Inc.* v. *Town of Milwaukee, Wis., et al.*, 135 F. 2d 878 (C. C. A. 7). Indeed, the United States was not even entitled to notice of such proceedings. *United States* v. *Certain Lands in Town of Hempstead, Nassau County, New York*, 129 F. 2d 918 (C. C. A. 2).

amount was controlled by certain lease provisions;[2] and it plainly regarded the cases as governed by the same criteria as would have been applicable if the controversy had been between the tenant and the United States. This appears from the court's express reliance in its opinions on the decision of this Court in *United States* v. *General Motors Corporation,* 323 U. S. 373—a decision which, of course, dealt directly and exclusively with the liability of the United States upon condemnation of a leasehold.[3] Accordingly, there is likelihood that the rulings below will be urged as precedents to the disadvantage of the United States in future litigation to which it may be a party.

In the *General Motors* case, this Court said (323 U. S. at 379):

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[2] The petitions for writs of certiorari seek to present the questions whether a lease provision for termination of the lease upon condemnation "by any company or corporation lawfully qualified to exercise the right of eminent domain" was effective upon condemnation by the United States, and, if not, whether the condemnation brought into play a separate provision for liquidated damages upon sale of the property. The United States does not desire to take any position on these questions, at least at this stage of the litigation, and this memorandum is not concerned therewith.

[3] That the trial court followed the same view appears from the fact that the judge, in ruling on the admissibility of evidence and in instructions to the jury, repeatedly pointed out that the United States had not taken either the machinery or the business, and that the value of the leasehold alone was therefore at issue (No. 1302: R. 87, 163, 205, 492, 529; No. 1303: R. 55, 174, 375, 408).

> The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. * * * We are not to be taken as departing from the rule they have laid down, which we think sound.

In the instant cases, the United States took the fee. Nevertheless, the circuit court of appeals sustained the method of valuation employed at the trial, saying:

> The instant case is not completely parallel with the *General Motors* case, and not all that is said in that opinion is applicable to the facts here, but in so far as applicable we think the principles there enunciated were properly applied.

We construe the *General Motors* decision as being inapplicable where, as here, the United States condemns a fee title, as well as where the United States condemns for a period of time longer than the term of existing leases. We deem it important that the limitations of the *General Motors* decision be made clear to the lower courts, in order that the doctrine of that case be not misapplied to the detriment of the Government. To this end the

United States has filed a petition for writs of certiorari (Oct. Term 1944, Nos. 1272–1278) to review the decision of the Circuit Court of Appeals for the Tenth Circuit in *United States* v. *Petty Motor Company,* et al., 147 F. 2d 912, where, it is believed, the *General Motors* decision was misapplied to sustain the admission of evidence of removal costs and consequential damages in the valuation of the rights of tenants whose terms were of shorter duration than that taken by the Government. The instant cases, it is believed, involve a comparable misapplication of the doctrine of the *General Motors* case, and present equally cogent grounds for the issuance of the writs of certiorari prayed by the petitioner. If the writs are granted, the United States proposes to participate in the cases on certiorari because of the importance of determining the correct application of the *General Motors* decision.

Respectfully submitted.

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